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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 166

ANTHONY VOLKRINGER, ALSO KNOWN AS TONY E. VOLKRINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 271–280) is not reported. The opinion of the circuit court of appeals (R. 301–307) is reported in 154 F. 2d 224.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 11, 1946 (R. 308). The petition for a writ of certiorari was filed on June 10, 1946. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether in this condemnation proceeding there was substantial evidence to support the finding of commissioners as to the fair market value of the property taken.

STATEMENT

This case arose from condemnation proceedings instituted on July 3, 1942, accompanied by a declaration of taking upon which judgment was entered the same date, to acquire 1,172.11 acres of land in Orange County, New York (R. 5–15, 25–26, 29–30) needed for use in connection with the expansion of the West Point Military Reservation for additional training facilities and related military purposes (R 16). This petition involves one parcel of land included in the taking, Tract No. 78, consisting of 18¾ acres owned by Anthony Volkringer, a farmer, who had devoted it principally to the pig business. (R. 148, 169, 198, 211–212).

Seven acres of this tract were drained black muckland (R. 169, 200, 247), and according to the landowner's witness, Rossitto, who was in the peat moss business, contained over 112,000 cubic yards of peat moss which the owner could sell for twenty cents a yard (R. 153, 156), although there was no evidence that he had ever done so (cf. R. 158, 211,

213). Rossitto did not testify as to market value based on such use of the land, and stated on cross-examination that he had no knowledge of the market value of such lands (R. 157, 162, cf. 277). The only testimony of market value given for the owner was that of his expert witnesses Brown and Wallace, who valued the property with improvements at $6700 and $6095 respectively, Brown allotting $4200, and Wallace $3200, to the muckland, which they both testified they had valued as farmland and not as commercial peat bog (R. 169, 170, 200, 201, 278). Government witness Yates, a real estate expert, valued Tract No. 78 with improvements at $2800, of which $1400 was for all the land, including the muckland (R. 214, 233, 278). He stated on cross-examination that he gave consideration in his appraisal to the presence of peat moss and, absent that element, his appraisal would have been lower (R. 247).

The commissioners, who viewed the property both before and after hearing the testimony (R. 147, 263–264), awarded $3750 for this parcel giving a higher per acre value to the muckland (R. 267, 278). When the Government moved for an order confirming the report of the commissioners, Volkringer opposed it (R. 269, 271, 283). The district court confirmed the report, writing an opinion which analyzed the evidence and con-

cluded that the award seemed reasonable and fair (R. 277–280, 284). Upon appeal by Volkringer, the circuit court of appeals found nothing in the record to justify a conclusion that the commissioners had followed an erroneous rule of law or that the evidence compelled a different award, and affirmed the judgment of the district court (R. 305, 307).

ARGUMENT

Petitioner asserts that in valuing his property the commissioners failed to consider the highest and best use to which the property was adaptable (Pet. 13–18). But as the Statement (*supra*) shows, the witnesses and the commissioners did consider the possibility of use for the sale of peat moss. Petitioner's complaint really is that the property was not valued as if it were being used for that purpose at the date of taking. This complaint lacks foundation. While the highest and most profitable use is to be considered "to the full extent that the prospect of demand for such use affects the market value," it is "not necessarily * * * the measure of value." *Olson* v. *United States,* 292 U. S. 246, 255. Thus, there was no misapplication of applicable rules of law but merely, as the trial court said (R. 279), "the usual dispute as to values, given by witnesses." Similarly, petitioner's attack (Pet. 18–20) upon the Government's expert witness constitutes

simply assertions concerning the weight to be given his testimony.[1]

As both courts below have held, there was substantial evidence to support the commissioners' conclusion as to market value of petitioner's tract (see Statement, *supra*). There is, therefore, as applied to the facts here, no difference between federal and state law as petitioner asserts (Pet. 10–12). Under either rule, review is limited to errors of law and does not permit reversal of findings which are supported by substantial evidence. Moreover, the court below was clearly correct in its holding (R. 305–307) that because the commissioners were authorized to view the property and to use their special knowledge the factual review on appeal is necessarily more limited than in the usual case of findings when all the evidence is in the record. Thus, the holding is not that federal appellate courts are bound to conform to the practice of state appellate courts (cf. Pet. 10–12) but that, when conformance is had in the federal trial courts to the local commissioner procedure the same considerations which lead the state appellate courts to restrict review of commissioners' awards apply to the federal courts.

[1] The qualifications of an expert is, of course, a matter which rests in the discretion of the trial court. *Love* v. *United States*, 141 F. 2d 981, 983 (C. C. A. 8); *Redman* v. *United States*, 136 F. 2d 203 (C. C. A. 4).

CONCLUSION

The decision of the circuit court of appeals is in accordance with established principles of law. There is no conflict of decisions nor question of general importance. It is therefore respectfully submitted that the petition should be denied.

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